

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Richmond Division)**

In re:

**CIRCUIT CITY STORES, INC. *et al.*,
Debtors.**

Chapter 11

**Case No. 08-035653-KRH
(Jointly Administered)**

**MOTION AND SUPPORTING MEMORANDUM OF LAW
OF MCALISTER SQUARE PARTNERS, LTD. FOR AN ORDER COMPELLING
DEBTORS TO IMMEDIATELY PAY ADMINISTRATIVE RENT PURSUANT TO 11
U.S.C. §§ 365(d)(3) AND 503(b) AND GRANTING RELATED RELIEF**

COMES NOW McAlister Square Partners, Ltd. (the “Landlord”), owner and lessor of certain nonresidential real property, to hereby move this Court to enter an order (the “*Motion*”), substantially in the form attached hereto as **EXHIBIT B**: (a) authorizing and directing Debtor, Circuit City Stores, Inc., one of the Debtors in the above-captioned bankruptcy cases (the “Debtors”), to immediately pay outstanding administrative rent for November, 2008 pursuant to 11 U.S.C. §§ 365(d)(3) and 503(b) of the *United States Bankruptcy Code*, and (b) granting related relief, as more specifically described herein. In support of its *Motion*, the Landlord respectfully states as follows:

Jurisdiction and Venue:

1. This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334.

This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

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C. Thomas Ebel, Esquire (VSB #18637)
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Counsel for McAlister Square Partners, Ltd.

Basis for Relief:

2. Sections 365(d)(3) and 503(b)(1)(A) authorize the relief requested in this *Motion*.

Background:

3. The Landlord is the lessor and landlord of certain nonresidential real property set forth below:

Owner/Lessor/Landlord	Store/Location ("Leased Premises")	Date of Lease ¹
McAlister Square Partners, Ltd.	Burleson Texas Store No. 4338	April 3, 2007

4. Pursuant to the Lease, the Debtors were required to pay, on the last business day of each month, payable by wire, minimum rent and other charges, including CAM, real estate taxes, and insurance.

5. On November 10, 2008 (the "Petition Date"), the Debtors and various of its debtor affiliates filed their respective voluntary petitions for relief under Chapter 11 of the *Bankruptcy Code*.

6. The Debtors currently remain in possession of, and enjoy the use and occupancy of, the Leased Premises.

7. The Debtors have not paid the rent due in November, 2008, for the Leased Premises nor paid the portion of the November administrative rent and other related charges due and owing under the Lease for the post-petition period commencing upon November 10, 2008, and ending November 30, 2008 ("November Administrative Rent").

Store/Location

November Administrative Rent Due

Burleson, Texas
Store No. 4338

\$17,184.99

¹ A true copy of the Lease, designated as **EXHIBIT A** (the "Lease") will be made available upon reasonable request to undersigned counsel.

Relief Requested:

8. The Landlord respectfully moves this Court for entry of any order, substantially in the form attached hereto as **EXHIBIT B**: (a) authorizing and directing the Debtors to immediately pay the November Administrative Rent owed to the Landlord pursuant to Sections 365(d)(3) and 503(b) of the *Bankruptcy Code*; (b) authorizing and directing the Debtors to reimburse the Landlord for all of its reasonable and actual attorneys' fees and costs incurred in preparing and prosecuting this *Motion* due to the Debtors' failure to comply with the terms of the Lease and Sections 365(d)(3) and 503(b) of the *Bankruptcy Code*; (c) authorizing and directing the Debtors to make all future monthly payments of administrative rent and related charges to the Landlord in full on or before the last business day of the month payable by wire for which such administrative rent and related charges accrue, as required by the Lease; and (d) granting such other and further relief as this Court deems just and proper.

Argument:

9. Section 365(d)(3) of the *Bankruptcy Code* provides, in relevant part, as follows:

The trustee shall *timely perform all the obligations of the debtor*, . . . arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1). . . .

11 U.S.C. § 365(d)(3)(emphasis added).

10. Since the *Bankruptcy Code* compels a landlord to continue post-petition performance, "the provisions of §§ 365(b)(1) and 365(d)(3) unambiguously grant priority status to this class of involuntary claimant." *In re Pudgie's Dev. of NY, Inc.*, 202 B.R. 832, 836 (Bankr. S.D.N.Y. 1996). Such protections are critical to protect landlords from ever-increasing losses during the post-petition, pre-rejection period.

11. This Court and other jurisdictions have repeatedly held that Section 365(d)(3) requires the timely payment of post-petition rent as an administrative expense at the full

contract rate. *See In re Trak Auto Corp.*, 277 B.R. 655, 665 (Bankr. E.D. Va. 2002) (until lease rejected, debtor required to pay rent to landlord from the date of petition until date lease rejected), *rev'd on other grounds*, 367 F.3d 237 (4th Cir. 2004); *see also In re Best Products Co., Inc.*, 206 B.R. 404, 406 (Bankr. E.D. Va. 1997) (Congress enacted 365(d)(3) to guarantee landlords would not be placed at disadvantage for providing post-petition services to debtor).

12. In light of the Debtors' failure to pay the November Administrative Rent, the Debtors will likely continue to ignore their post-petition obligations under the Lease in violation of the *Bankruptcy Code*. Accordingly, the Court should enter an order directing the Debtors to immediately pay the November Administrative Rent and timely pay all future administrative rent and related charges that arise under the Lease on a post-petition basis.

13. Furthermore, the Lease provides that the Debtors are obligated to promptly reimburse the Landlord for all reasonable and actual legal fees incurred in connection with enforcing the Lease after the Debtors default on their obligations thereunder. Accordingly, the Landlord requests that the Debtors be directed to pay the attorneys' fees and costs incurred by the Landlord in connection with filing and prosecuting this *Motion*.

Waiver of Memorandum of Law:

14. The Landlord respectfully request that this Court treat this *Motion* as a written memorandum of points and authorities or waive any requirement that this *Motion* be accompanied by a written memorandum of points and authorities as described in Rule 9013-1(G) of the *Local Rules of the United States Bankruptcy Court for the Eastern District of Virginia*.

No Prior Request:

15. No previous motion for the relief sought herein has been made to this Court or any other Court.

WHEREFORE, by reason of the foregoing and any arguments at hearing, the Landlord respectfully requests entry of an order, substantially in the form attached hereto as **EXHIBIT B**: (a) authorizing and directing the Debtors to immediately pay the November Administrative Rent owed to the Landlord pursuant to Sections 365(d)(3) and 503(b) of the *Bankruptcy Code*; (b) authorizing and directing the Debtors to reimburse the Landlord for all of its reasonable and actual attorneys' fees and costs incurred in preparing and prosecuting this *Motion* due to the Debtors' failure to comply with the terms of the Lease and Sections 365(d)(3) and 503(b) of the *Bankruptcy Code*; (c) authorizing and directing the Debtors to make all future monthly payments of administrative rent and related charges to the Landlord in full on or before the last business day of the month by wire for which such administrative rent and related charges accrue, as required by the Lease; and (d) granting such other and further relief as this Court deems just and proper.

Dated: December 12, 2008

Respectfully Submitted,

MCALISTER SQUARE PARTNERS, LTD.

By: /s/ William A. Gray
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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of December, 2008, a true and accurate copy of the foregoing was electronically filed with the Clerk of the Court for the Eastern District of Virginia, Richmond Division, using the CM/ECF system, which thereby caused the above to be served electronically on all registered users of the ECF system that have filed notices of appearance in this matter, and was mailed, by U.S. Mail, first class, postage prepaid, to all persons on the attached Service List.

_____/s/ William A. Gray

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EXHIBIT B

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Richmond Division)**

In Re:)	
)	Chapter 11
CIRCUIT CITY STORES, INC., <u>et al.</u>,)	Case No. 08-035653-KRH
)	(Jointly Administered)
Debtors.)	

ORDER

This matter having come before the Court upon the *Motion and Supporting Memorandum of McAlister Square Partners, Ltd. for an Order Compelling Debtor to Immediately Pay Administrative Rent Pursuant to 11 U.S.C. §§ 365(d)(3) and 503(b) and Granting Related Relief* (the “*Motion*”) filed in the bankruptcy case of the above-captioned Debtors and Debtors in Possession, including specifically, Circuit City Stores, Inc. (the “Debtors”), the Court finds that (i) it has jurisdiction over the matters raised in the *Motion* pursuant to 28 U.S.C. §§ 157 and 1334; (ii) this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); (iii) notice of the *Motion* and the opportunity for a hearing thereon on December 22, 2008, at 1:00 P.M. has been given and no other or further notice is necessary; and (iv) good and sufficient cause exists for the granting of the relief requested in the *Motion* after having given due deliberation upon the *Motion* and the arguments presented at any hearing had thereupon. Therefore,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. The *Motion* is **GRANTED**;
2. Unless otherwise defined herein, each capitalized term shall have the meaning ascribed to it in the *Motion*;

3. The Debtors are authorized and directed to pay within two (2) business days of the entry of this Order, the November Administrative Rent to the Landlord in the amount of \$17,184.99;

4. The Debtors shall, within two (2) business days of their receipt of a written request from the Landlord therefore, reimburse the Landlord for all of its reasonable and actual attorneys' fees and costs incurred in preparing and prosecuting the *Motion*;

5. The Debtors shall make all future monthly payments of administrative rent and related charges to the Landlord in full on or before the last business day of the month, payable by wire for which such administrative rent and related charges become due under the Lease, and shall pay the real estate taxes, all as required by the Lease;

6. This Court retains jurisdiction to enforce and implement the terms and provisions of this Order and to resolve any and all disputes related thereto; and

7. The Clerk is requested to send copies of this Order, after entry, to all parties and counsel as set forth herein.

ENTERED ON THE DOCKET:

_____/2008

The Honorable Kevin R. Huennekens
United States Bankruptcy Judge
Eastern District of Virginia
Richmond Division

I ASK FOR THIS:

/s/ William A. Gray

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PROOF OF SERVICE PURSUANT TO LOCAL RULE 9022-1(C)(2)

I hereby certify that the foregoing proposed Order has been served upon all necessary parties as set forth in the Service List below, electronically through the Electronic Case Filing (“ECF”) System and by United States Mail, first class, postage prepaid on this 12th day of December, 2008.

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